ADNAN AHMAD A

v.

KETUA PENGARAH KASTAM & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
T SELVENTHIRANATHAN HC
[SUIT NO: S2-21-298-2007]
10 SEPTEMBER 2009

PUBLIC SERVANTS: *Dismissal - Challenge of - Action to challenge dismissal - Whether time barred - Public Authorities Act 1948, s. 2(a)* C

CIVIL PROCEDURE: *Striking out - Application for - Rules of the High Court 1980, O. 18 r. 19(1)(b) & (d) - Whether action to challenge dismissal of plaintiff time barred - Public Authorities Act 1948, s. 2(a)* D

The plaintiff, a superintendent of customs, was dismissed from the employment of the fourth defendant, the Government of Malaysia. The plaintiff therefore filed this action on 30 November 2007 challenging his dismissal. The defendants then filed the application in encl. (5) pursuant to O. 18 r. 19(1)(b) and (d) of the Rules of E the High Court 1980 seeking an order that the writ of summons and the statement of claim which had been filed by the plaintiff in this action be set aside or struck out. The defendants also sought to invoke the inherent jurisdiction of this court to make such order on the basis that the action was time barred as it had been filed F outside the three year limitation period from which the cause of action arose as specified under s. 2(a) of the Public Authorities Protection Act 1948.

Held (order in terms of defendant's application in encl. 5; dismissing plaintiff's writ of summons in encl. 1 and statement of claim in encl. 2): G

(1) The action that was filed on behalf of the plaintiff on 30 November 2007 was time barred by virtue of the fact that H the decision under challenge was made on 15 October 2004. Therefore, any action calling that decision into question should have been filed by 14 October 2007 at the latest. The plaintiff in this case was therefore out of time by forty seven days when the action was filed. As the Federal Court stated in *Selvaraju Ponniah*, the court could not act beyond what the language of I the statute provides. (para 20)

A ***Obiter:***

(1) It may perhaps be fairer in the interests of justice for the law to be amended along similar lines as provided for in s. 23(1) of the Town and Country Planning Act 1976 so that the time
B will begin to run only from when the decision is communicated to the individual concerned and not from when the decision is made. But that is a matter within the province of the legislature to be considered as the situation demands. It is not the function of the courts to transgress into an area within the
C jurisdiction of the legislature. (para 22)

Case(s) referred to:
Datuk (Datu) Amir Kahar Tun Mustapha v. Tun Mohd Said Keruak (Yang di-Pertua Negeri Sabah) & Ors [1994] 4 CLJ 656 HC ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
D *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 6 CLJ 245 FC* ***(foll)***

Legislation referred to:
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d)
E Town and Country Planning Act 1976, s. 23(1)

For the plaintiff - Raja Singam; M/s Raja Singam & Co
For the defendant - Natra Idris FC; AG's Chambers

Reported by Suhainah Wahiduddin
F

JUDGMENT

T Selventhiranathan HC:
G

[1] The plaintiff, a superintendent of customs, was dismissed from the employment of the fourth defendant, the Government of Malaysia. The plaintiff therefore filed this action on 30 November 2007 challenging his dismissal upon various grounds, primarily on
H the basis that there had been a breach of natural justice in his case and also that there had been bias in the order of dismissal that was made against him.

[2] The defendants then filed the application in encl. (5)
I pursuant to O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980 seeking an order that the writ of summons and the statement of claim which had been filed by the plaintiff in this

action be set aside or struck out. The defendants also sought to invoke the inherent jurisdiction of this court to make such an order. The basis of the application was that the action was time-barred as it had been filed outside the three-year limitation period from which the cause of action arose as specified under s. 2(a) of the Public Authorities Protection Act 1948.

[3] Learned Federal Counsel Natra Idris for the defendants submitted that she made the application in reliance upon the undisputed facts as presented by the plaintiff and based upon the decision of the Federal Court in the case of *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 6 CLJ 245. She also relied on the case of *Datuk (Datu) Amir Kahar Tun Mustapha v. Tun Mohd Said Keruak (Yang di-Pertua Negeri Sabah) & Ors* [1994] 4 CLJ 656 as authority for the proposition that there was no requirement to file an affidavit in a case where the facts were undisputed. In those circumstances she contended that the case of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609, cited by Mr Raja Singam, learned counsel for the plaintiff, was not relevant as there were no material contradictions or differences between the parties on the facts for an affidavit in reply by the defendants to be filed.

[4] Mr Raja Singam, on the other hand, submitted that the defendants had neither filed their defence nor filed any affidavit to dispute what was stated by the plaintiff in his statement of claim and furthermore the defendants sought to adduce evidence through para. 2 of their written submissions. He went on to argue that the case of *Selvaraju Ponniah (supra)* was distinguishable on the facts as the appellant there had become fully aware of his dismissal and was appealing against it. In the present case, the dismissal took effect after the show-cause letter had been issued by the defendants and it had been replied to by the plaintiff. He said that until the plaintiff received the letter communicating the order of dismissal to him, he was totally unaware of that order.

[5] The learned federal counsel then replied that the defendants relied entirely on the facts as pleaded by the plaintiff in paras. 23 to 25 of the statement of claim in encl. (2). Based on the plaintiff's own statement of facts as pleaded, the plaintiff had become aware that he was going to be dismissed or reduced in rank.

[6] I reserved decision on the matter as I wanted to study the submissions in depth as the application of the defendants, if successful, would have far-reaching consequences as far as the plaintiff was concerned in that his complaint that he was wrongfully dismissed would stand without the remedy that he seeks through this action.

[7] Having studied the matter, I now proceed to consider cls. 23 to 25 in the statement of claim.

[8] By para. 23 of the statement of claim, the plaintiff alleges that he received the letter from the third defendant headed "Kenyataan Alasan Buang Kerja Atau Turun Pangkat", which translated loosely would read "statement of grounds to dismiss or to reduce in rank". He received this letter on 4 June 2004.

[9] By para. 24, the plaintiff states that he replied to this letter by his letter of 29 June 2004 giving his reasons as to why he should not be reduced in rank or dismissed from service. He contends that there had been an element of bias as well as breaches of natural justice in the disciplinary proceedings which had been taken against him.

[10] Despite this he says, in para. 25 of the statement of claim, that he received a letter on 1 December 2004, dated 15 October 2004, which carried the caption "Keputusan Tatatertib Suruhanjaya Perkhidmatan Awam", and again translated loosely would read "decision of the Public Services Commission on disciplinary proceedings", which conveyed the decision that the punishment that was to be inflicted upon him was that of dismissal with immediate effect.

[11] Against this background I am in agreement with the submissions of the learned Federal Counsel that there is no need for the defendants to file any affidavit to support the application in encl. (5) for the reasons which I shall set out a little later in this judgment. I would go so far as to say that the defendants could well have made the application to strike out this action under O. 18 r. 19(1)(a) of the Rules of the High Court 1980, ie, that the proceedings brought by the plaintiff disclose no reasonable cause of action having regard to the defence of time-bar that is said to be applicable. That has been the argument of the defendants.

[12] Mr Raja Singam sought to state that since the letter communicating the decision as to the plaintiff's dismissal from the employment of the fourth defendant was only received on 1 December 2004, the plaintiff's action challenging his dismissal which was filed on 30 November 2007 was not prevented from being brought by reason of the defence of time-bar or limitation being applicable. In other words, the action was commenced within the thirty-six-month limitation period specified in s. 2(a) of the Public Authorities Protection Act 1948.

[13] With respect, I am unable to agree. This is because the decision of the Federal Court in the case of *Selvaraju Ponniah (supra)* is very clear insofar as the operation of the defence of time-bar or limitation is concerned and it is binding on me. In that case, the board which heard the appeal made its decision on 19 October 1992 dismissing the appeal. This was conveyed to the appellant *vide* a letter dated 26 November 1992. On 24 November 1995, the appellant filed the action in that case.

[14] The Federal Court in deciding the matter there referred to s. 2(a) of the Public Authorities Protection Act 1948 which reads as follows:

> Protection of persons acting in execution of statutory or other public duty
>
> 2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceedings *shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of* or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;
>
> (emphasis added).

[15] At p. 257 para. 18 of the judgment in *Selvaraju Ponniah (supra)*, the Federal Court had this to say:

> [18] In our judgment section 2(a) of the Act is mandatory in its terms. The word 'shall' is used twice in that section indicating that the 36-month period in respect of time is a mandatory

> requirement and it cannot be abridged (sic). It is therefore clear that time starts to run from the act complained of and not the communication of the decision as contended by the appellant. The 'act' in the present case is the decision of the Board dismissing the appellant's appeal. This decision was made on 19 October 1992 as stated in the letter dated 26 November 1992. Hence, the time to file the action runs from the date of the decision and the last date to file it would be on 18 October 1995 and not on 25 November 1995. If time were to run from the date of communication of the decision on 26 November 1992 as contended by the appellant and not the date when the decision was made on 19 October 1992 then the provision in section 2(a) of the Act would have said so in the section. But here there was no such provision.

[16] In the above passage, the word "abridged" used must necessarily mean "enlarged" or "extended" and, to my mind, was mistakenly used for either of those two latter words.

[17] Perhaps it may not be remiss of me to address the circumstances where the words "abridged", and "enlarged" or "extended", are used in relation to acts which are to be performed within specified timeframes. I find the need to do this in light of the frequent instances where practising advocates and solicitors have erroneously filed applications for "abridgement of time" when an act had not been performed within a specified timeframe when in fact what they should have sought was an enlargement or extension of time to perform the act outside the stipulated time period owing to their or their client's failure to perform the act in question within time. Therefore, in the context of what I have stated earlier, the phrase "abridgement of time" is the antithesis of the phrases "enlargement of time" and "extension of time" and the former phrase cannot be used interchangeably with either of the latter two phrases as the two categories of phrases embody two different concepts. It is only when a party wishes to speed up matters and seeks to truncate time that it should apply for an abridgement of time and not otherwise.

[18] The Federal Court in *Selvaraju Ponniah (supra)* then went on to say that there could be other laws where the date in question would be the date of the communication of the decision concerned because there was a specific provision in those laws to that effect, an example being s. 23(1) of the Town and Country Planning Act 1976, which provides as follows:

Appeal against decision of local planning authority

23.(1) An appeal against the decision of the local planning authority made under subsection 22(3) may be made to the Appeal Board within one month **from the date of the communication of such decision to him**, ... (emphasis added).

[19] However, the Federal Court proceeded to say that the contention of the appellant in *Selvaraju Ponniah (supra)* was misconceived and that that being the case, the court found that the appellant's action there was time-barred as he was thirty-nine days late when he filed the action.

[20] Having said that, it is clear beyond peradventure that in the present case the action that was filed on behalf of the plaintiff on 30 November 2007 was similarly time-barred by virtue of the fact that the decision under challenge was made on 15 October 2004. Therefore, any action calling that decision into question should have been filed by 14 October 2007 at the latest. The plaintiff in this case was therefore out of time by forty-seven days when the action was filed.

[21] I do realise that a complaint may be made that the individual concerned will only become aware of the decision in question when it is actually communicated to him and not when the decision is made but not conveyed to him simultaneously. However, as the Federal Court stated in *Selvaraju Ponniah (supra)*, the court cannot act beyond what the language of the statute provides.

[22] It may perhaps be fairer in the interests of justice for the law to be amended along similar lines as provided for in s. 23(1) of the Town and Country Planning Act 1976 so that the time will begin to run only from when the decision is communicated to the individual concerned and not from when the decision is made. But that is a matter within the province of the legislature to be considered as the situation demands. It is not the function of the courts to transgress into an area within the jurisdiction of the legislature.

[23] Having said that, I make an order in terms of the defendants' application in encl. (5) and consequentially the writ of summons in encl. (1) and the statement of claim in encl. (2) are dismissed with costs.